Petition

81-618

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT SMITH,
Individually and in his capacity as Acting Administrator of the Indiana Department of Public Welfare, et al.,

Petitioner,

vs.

LOUISE BOND,
Individually and on behalf of her minor children, and others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Whether Federal Rules of Civil Procedure 52(b) and 59(e) authorize the amendment of the district judge's order in the fashion requested by respondents, or the ordering of such amendment by the Court of Appeals.

2. Whether the procedural devices employed by the respondents can be invoked to justify the retroactive application of later-adopted regulations to decide a cause of action dismissed in August, 1976 or to warrant the disregarding or reweighing of the evidence presented to the district judge.

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[1] Parties: Petitioners Robert Smith, Acting Administrator of the Indiana State Department of Public Welfare; Marion M. Hilger, John R. Seffrin, Arvella M. Stanton, Robert G. Watson, Jr., and James W. Burnett, Jr., Members of the State Board of Public Welfare. Respondents Louise Bond; Rose Edwards, President, New Day Welfare Organization, an unincorporated association; Sara Jude, President, Gary AFDC Mothers' Organization, an unincorporated association; Norma Jean Moore, President, East Chicago Welfare Rights Organization, an unincorporated association; individually and on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Robert Smith, respectfully prays that a writ of certiorari issue to review the judgment and opinion

of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 27, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at page A-1. The order of the District Court for the Northern District of Indiana denying the respondents' motion to amend the order of August 6, 1976, is appended at Page A-13. The August 6, 1976 order dismissing the cause is appended at page A-15.

JURISDICTION OF THIS COURT

Petitioners seek to invoke the jurisdiction of this Court in order to obtain review of the July 27, 1981 judgment of the Court of Appeals for the Seventh Circuit. No petition for rehearing has been filed, and no extension of time within which to file this petition has been sought. This Court's jurisdiction is provided under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The provisions of pertinent statutes and regulations are, due to their length, set forth in the Appendix commencing at page A-15.

STATEMENT OF THE CASE

This action was instituted in 1973 by way of a complaint for injunctive relief pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3) and (4), 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 1331, alleging that petitioners here had failed to comply with federal mandates as to the Early and Periodic Screening, Diagnosis, and Treatment program (hereafter EPSDT) for children. After discovery and cross motions for summary judgment, the district judge entered an order on March 22, 1974, denying petitioners' motion and granting in part that of respondents. The order required the implementation of an EPSDT program by July 1, 1974

but denied respondents' prayer for damages. The opinion of the district judge is reported at 372 F.Supp. 872 (N.D. Ind., 1974).

Petitioners appealed, and the Court of Appeals for the Seventh Circuit affirmed in its opinion appearing at 504 F.2d 1246 (7th Cir., 1974). A petition for certiorari to this Court was denied at 420 U.S. 984, on March 17, 1975. The portion of respondent's complaint requesting attorneys fees was considered in separate proceedings which are not at issue here.

On January 24, 1975, the district judge ordered that a plan for implementing federal EPSDT provisions be submitted; a plan was accordingly submitted by petitioners on March 6, 1975. Following discovery, on August 6, 1976 the district judge found Indiana's plan to be in full compliance with federal regulations and entered an order dismissing the cause.

On August 16, 1976, the respondents filed a motion to amend the August 6 judgment pursuant to Rules 59(e) and 52(b) of the Federal Rules of Civil Procedure. Respondents filed memoranda supporting the motion on October 4 and 26, 1976 and requested a hearing in August, 1978. Both parties filed further memoranda, and an evidentiary hearing was held on March 21, 1980. On May 16, 1980, the district judge denied the respondents' motion to amend the August 6, 1976 judgment.

Respondents appealed to the Court of Appeals for the Seventh Circuit, and after briefs and argument were submitted that court reversed. While stating that Indiana need not 'comply to the letter with every HEW [HHS] guideline', that court stated that Indiana was not in compliance in 1976 and directed that the district judge apply later-adopted regulations in analyzing the resubmitted state plan. The court found to be deficient the state provisions for screening, provider identification, and follow-up, also known as tracking, while stating that it was

applying only those regulations in effect at the time of the judge's order. It is from the ruling of the Court of Appeals that review is now sought.

ARGUMENT SUPPORTING THE GRANTING OF THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS AS TO THE INTERPRETATION OF F.R.C.P. 59(e) AND 52(b).

The instant cause was presented to the Court of Appeals for the Seventh Circuit, by way of the district judge's denial of respondents' motion to amend judgment, which motion requested that the district judge alter his order to reflect the opposite of his original intention. Respondents moved the trial judge to find that Indiana's EPSDT program was *not* in compliance with federal law—although the August 6, 1976 order found full compliance. In reversing the district judge's denial of the motion to amend, the Court of Appeals exceeded the scope of review properly allowed it as to such a motion and apparently accepted, though erroneously, that a motion to amend could achieve the results desired by respondents.

It has frequently been held that a motion to amend judgment is addressed to the discretion of the trial judge and that his decision is reviewable only for an abuse of that discretion. *Forman v. Davis*, 371 U.S. 178 (1962); *Adelman v. Paramount Pictures, Inc.*, 182 F.Supp. 217 (D.C.Tex., 1960); *aff'd.* 296 F.2d 308, *cert. denied* 369 U.S. 851. Such a motion cannot be used as a vehicle for rehearing to alter the judgment in matters of substance, to relitigate the merits, or to raise matters outside the scope of the pleadings or request relief other than that intended by the judgment. *Davis v. Mathews*, 450 F.Supp. 308 (D.C. Cal., 1978); *Heikkila v. Barber*, 164 F.Supp. 587 (D.C.Cal., 1958) *aff'd.* 216 F.2d 407, *app. dism'd.* 308 F.2d 558; *Evans, Inc. v.*

Tiffany & Company., 416 F.Supp. 224 (D.C.Ill., 1976); *Mueller v. Korholz*, 449 F.2d 82 (7th Cir., 1971), *cert. den. sub. nom. Wolff v. Korholz*, 405 U.S. 922; *Swope v. General Motors Corp.*, 445 F.Supp. 1222 (D.C.Mo., 1978). As then Circuit Judge, now Justice, Stevens stated in *Mueller, supra.*

> [W]e think it is plain that the attempt to raise an entirely new series of issues, both factual and legal, after the judgment comes too late.

The general rule is that, while a judgment may be amended by motion to correct clerical or formal errors, it may not be altered in a manner which is contrary to the original intention expressed therein or to create a different judgment than was actually rendered. *Swope, supra;* 49 C.J.S. Judgments §§ 238, 246, 259.

Since the district judge could not properly have granted the respondents' motion—which would have had the August 6, 1976 order express an intention directly contrary to its original terms—it is improper for the Court of Appeals to effect such a change under the unstated assumption that respondents were taking a usual direct appeal. Respondents bear the burden of establishing that the district judge committed a manifest abuse of discretion; this showing they have wholly failed to make. *Matter of Christian and Porter Aluminum Co.*, 584 F.2d 326 (9th Cir., 1978). The Court of Appeals then went beyond a review of that discretion, *Harjo v. Andrus*, 581 F.2d 949, 189 U.S. App. D.C. 171 (D.C. Cir., 1978), and tried the cause de novo, in excess of its duty. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, 593 F.2d 129 (8th Cir., 1979); *cert. den.* 444 U.S. 838; *Barnes v. St. Catherine's Hospital*, 566 F.2d 324 (7th Cir., 1977).

Thus, this Court may accept jurisdiction and issue the writ herein on several alternative grounds. First, certiorari may issue to construe the Federal Rules of Civil Procedure. *Hickman v. Taylor*, 329 U.S. 495 (1947).

Second, certiorari may issue where the decision below is of a special and important nature, where the public has a great interest in the outcome, or where there is a risk of an 'inconclusive and divisive disposition' of the issues without further clarification. *Rick v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955); *United States v. Coleman*, 390 U.S. 599 (1968). Third, the writ may issue to correct or vacate an erroneous judgment below. *Morton v. Ruiz*, 415 U.S. 199 (1974); *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964). Fourth, and most important, certiorari may issue where a conflict in decisions exists, or where the lower court's ruling contravenes authority of this Court and other courts, particularly where the possibility of recurrence is high. *Aldinger v. Howard*, 427 U.S. 1 (1976).

As the opinion of the Court of Appeals seriously threatens the harmonious interpretation of Federal Rules 52(b) and 59(e), it is of paramount importance that review be had of its holding. This is especially true where an otherwise timely but improper motion to amend judgment has been filed while the time for direct appeal of the dismissal order has run.[2]

2. THE COURT OF APPEALS ERRONEOUSLY REQUIRED THE RETROACTIVE APPLICATION OF LATER-ADOPTED REGULATIONS AND DISREGARDED OR REWEIGHED THE EVIDENCE.

The opinion of the Court of Appeals herein purports to apply, to the respondents' claim that Indiana's EPSDT program is not in compliance, those federal statutes and regulations in effect at the time of the August 6, 1976 order

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[2]*See United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971) [decree must relate specifically and exclusively to the pleadings and the proof]; *A.R. Inc. v. Electro-Voice, Incorporated*, 311 F.2d 508 (7th Cir. 1962) [findings and conclusions on Rule 52(b) motion improper where summary disposition had].

by the district judge. However, the decision does not in fact reflect that only those provisions were considered and improperly exceeds the scope of the issue put before it (assuming, *arguendo*, that the appeal was correctly taken)—namely, whether on August 6, 1976 the district judge was clearly erroneous or without sufficient basis to conclude that the Indiana EPSDT program met at least the minimum requirements then existing. In addition, while referring to the Medical Assistance Manual introduced as evidence before the district judge, the Court of Appeals omits consideration of those sections of the Manual which are not strictly in accord with its own social views and appears to elevate the Manual's significance to the level of duly promulgated regulations. *See, e.g.*, MSA-PRG-27, Part 5, §5-70.9-00, Question 3 and 4.

While respondents' motion to amend judgment did not so state, the import of later supporting memoranda and of counsel's argument at the March 21, 1980 evidentiary hearing is that, since new federal regulations are frequently adopted modifying existing federal-state joint social welfare programs, this sort of litigation can never terminate and the state agency faces renewed litigation with each new regulation. Such a situation, where the original claimants may no longer have an interest in the outcome and where endless and excessive expenditures are required to defend state policy, is intolerably burdensome and may compel states which are confronted with such litigation to drop out of the program involved. The only way the Court of Appeals could have reached its decision was to ignore totally the evidentiary record or to reweigh that evidence.

The regulations in effect in August, 1976 are general in nature and are supplemented by the unpromulgated Medical Assistance Manual and other advisory guidelines. These regulations are set forth in the Appendix at page A-16. 45 C.F.R. §§ 205.146(c), 249.10(a)(3)(i), (iv) (1976). The district judge considered those regulations, the enabling

statute, and the evidence and found that Indiana was in full compliance with his earlier order to comply, thus warranting the dismissal of the suit. 42 U.S.C. § 1396d(a)(4)(B). In spite of respondents' urging that later-effective regulations be applied in examining the state plan, the district judge denied the motion to amend. *See* Respondents' "Second Supplemental Memorandum in Support of Motion to Amend, page 6 part C.

Under established authority, the district judge's refusal to hold Indiana to the much more detailed requirements of newer regulations is unquestionably correct. The standards set forth in later regulations alter the substantive rights, expectations and obligations of the parties since greater specificity and changes in the entitlements created in the rules are not mere variations on prior procedure but instead impose duties on petitioners which in 1976 were impossible to anticipate. *Hospital Emp. Labor Program of Metropolitan Chicago v. Ridgeway Hospital*, 570 F.2d 167 (7th Cir., 1978); *Tremps v. Ascot Oils, Inc.*, 561 F.2d 41 (7th Cir., 1977); *Daughters of Miriam Center of the Aged v. Mathews*, 590 F.2d 1250 (3rd Cir., 1978); *O'Daniel v. Richardson*, 458 F.2d 330 (6th Cir., 1972). This Court has held that no retroactive effect should be given to new provisions where their application would create more burden than benefits, and where no express statement requiring retroactivity existed. *Claridge Apartments Co. V. Comm'r of Internal Revenue*, 323 U.S. 141 (1944).

That holding has been followed in other federal courts. *Appalachian Power Co. v. Train*, 620 F.2d 1040 (4th Cir., 1980); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F.Supp. 1049 (D.C.N.C., 1980); *Jaymar-Ruby, Inc. v. Fed. Trade Commission*, 496 F.Supp. 838 (D.C.Ind., 1980); *Tye v. Spitzer-Dodge*, 449 F.Supp. 687 (D.C.Ohio, 1980), citing *Reynolds v. United States*, 292 U.S. 443 (1934). While the requirement of an express statement of retroactive application is not the deciding factor it once was, still a

provision which would cause manifest injustice or infringe on a matured right will only be applied prospectively. *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974).

In the present case, petitioners in 1976 had an expectation that the EPSDT program would be defined more specifically for a gradual expansion to provide the services required in new provisions, rather than a sudden, unguided and costly effort to go beyond the mandatory requirements of 1976 regulations. In addition, petitioners had an unconditional right to be held only to the criteria of existing regulations and to have litigation concerning those regulations resolved through an adherence to the rules of procedure and statutory construction. The remand of the cause will further confuse the situation, impair the above-mentioned rights of petitioners, and delay final resolution of the cause while not significantly aiding respondents. Having gone far beyond the scope of the pre-dismissal pleadings, this case should not be continued indefinitely or revived each time new regulations are adopted. The lack of due diligence on respondents' part in prosecuting their motion to amend judgment indicates that, though in 1976 there was no support for their position, the delay in litigation could be attributed to their anticipation of new provisions. This Court should not condone such a practice, which has no authority in procedure, and on the grounds set forth in Argument One, *supra*, it should issue the writ herein sought.

CONCLUSION

For these reasons, petitioners urge that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 80-1886

LOUISE BOND, individually and on behalf of her minor children, and others similarly situated, et al.,

Plaintiffs-Appellants,

v.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana Department of Public Welfare, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.
No. 73-C-184—**Allen Sharp**, *Judge.*

ARGUED APRIL 13, 1981—DECIDED JULY 27, 1981

Before SWYGERT, *Senior Circuit Judge*, CUMMINGS, *Circuit Judge*, and JAMESON, *Senior District Judge.**

SWYGERT, *Senior Circuit Judge.* In this class action lawsuit, before our court for the second time, plaintiffs allege that various Indiana state officials have failed to implement a mandatory federal health program critical to

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* The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

the welfare of Indiana's needy children. According to 42 U.S.C § 1396d(a)(4)(B), Early and Periodic Screening, Diagnosis and Treatment (EPSDT), a preventive health program for children, must be provided by each state participating in the federal Medicaid program.[1]

In March 1974, the district court enjoined the defendants from continuing to administer their program in violation of 42 U.S.C. § 1396d(a)(4)(B) and the regulations and guidelines thereunder. The defendants were ordered to implement a satisfactory EPSDT program in accordance with federal law. We affirmed that judgment noting:

> The mandatory obligation upon each participating state to aggressively notify, seek out and screen persons under 21 in order to detect health problems and pursue those problems with the needed treatment is made unambiguously clear by the 1967 act and by the interpretative regulations and guidelines.

504 F.2d 1246, 1251 (7th Cir. 1974).

Indiana submitted its proposed plan in March 1975, and in August 1976, the district court found that Indiana's EPSDT program was in compliance. After the plaintiffs' motion to amend the judgment was denied in May 1980, plaintiffs filed this appeal. For the reasons that follow, we reverse.

---

[1] In 1967 Congress amended Title XIX of the Social Security Act to require that each State operating a medical assistance plan receiving federal financial assistance furnish:

> early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects and such health care, treatment and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary.

42 U.S.C. § 1396d(a)(4)(B).

I

The thrust of the plaintiffs' argument is that Indiana still fails to recognize the extent to which Congress in enacting EPSDT imposed additional responsibilities on the states which had not been required under the regular Medicaid program. In our prior opinion, we quoted and endorsed the Department of Health, Education and Welfare (HEW) 1973 regulation guidelines for EPSDT, issued as part of the Medical Assistance Manual, Part 5, Sections 5-70-00 *et seq.* (MSA-PRG-21), which state: "Congress intended to require States to take aggressive steps to screen, diagnosis and treat children with health problems." MSA-PRG-21, § 5-70-20(A).[2]

A penalty of one percent of the amount payable by the Government to a state can be assessed for failure to provide the required services. 42 U.S.C. § 603(g). The penalty is imposed if a state fails to inform families of the health screening services, provide or arrange for screening where requested, or arrange for corrective treatment in response to the results of the screening. We previously noted that the failure of the federal administrative agency to assess a penalty did not preclude our court from ordering declaratory and injunctive relief. 504 F.2d at 1251.[3]

In our prior opinion, we considered the extent of Indiana's 1974 EPSDT program and found that it was inadequate:

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[2] The agency charged with administering EPSDT, the Department of Health, Education and Welfare has since been renamed the Department of Health and Human Services.

[3] Declaratory and injunctive relief at the behest of "those individuals most directly affected by the administration of [a] program" are available "should the State not develop a conforming plan within a reasonable period of time" when using federal funds. *Rosado v. Wyman*, 397 U.S. 397, 420-21, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). 504 F.2d at 1251.

> [L]etters were sent to Medicaid recipients which advised that caseworkers would visit the recipient and that "the caseworkers will want to know if you feel that your children have any health problems." Medicaid providers were advised that caseworkers would give each recipient a form "with instructions to contact their choice of appropriate Medicaid providers, should a health problem be reported by the recipient, observed by the caseworker, or should the recipient request any type of medical service...."

504 F.2d at 1250. We noted that the defendants themselves had summarized the nature of Indiana's compliance as follows:

> Any of the eligible children in this state can secure all of the requested services merely by requesting them from their local health provider....[Recipients] need merely take their children to the health provider of their choice and obtain for their children the required services.

504 F.2d at 1250-51 (quoting from the defendants' reply brief). In sum, we stated that Indiana's "somewhat casual approach" to EPSDT did not conform to the aggressive search for early detection and treatment of child health problems mandated by the 1967 statute and its interpretative regulations and guidelines. 504 F.2d at 1251. The question before us is whether the district judge was clearly erroneous in finding that Indiana's EPSDT program was in compliance in 1976.

The plaintiffs allege that the program was and is deficient in three major and overlapping respects: failure to define a "screening package" or conduct "screens"; failure to identify Medicaid providers willing to perform screens; and failure to monitor screening and the required subsequent diagnosis and treatment where indicated.

A. Screens

It is not disputed that Indiana's 1976 screening plan

required screening for general physical and mental defects, dental care and disease, and vision and hearing problems. The plaintiffs argue, however, that a more comprehensive approach was envisioned by Congress as set out in the HEW regulation guidelines which this court found to describe "what is required in the nature of case finding, screening, diagnosis and treatment," 504 F.2d at 1249. Those guidelines specified:

> At a minimum screening should include: a health and developmental history (physical and mental); an assessment of physical growth; developmental assessment; inspection for obvious physical defects; ear, nose, mouth and throat inspection (including inspection of teeth and gums); screening tests for cardiac abnormalities, anemia, sickle cell trait, lead poisoning, tuberculosis, diabetes, infections and other urinary tract conditions; and assessment of nutritional status and immunization status. An assessment of this nature is necessary to identify individuals with potential or apparent physical or mental health and developmental problems requiring diagnosis and, possibly, treatment.

MSA-PRG-21, § 5-70-20(B)(1).[4]

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[4] In 1979, a new regulation was promulgated which required that:

> [T]he agency must provide for at least the following screening services:
>
> (1) Health and developmental history.
>
> (2) Unclothed physical examination.
>
> (3) Effective January 1, 1981, developmental assessment.
>
> (4) Immunizations which are appropriate for age and health history.
>
> (5) Assessment of nutritional status.
>
> (6) Vision testing.
>
> (7) Hearing testing.
>
> (8) Laboratory procedures appropriate for age and population groups.
>
> (9) For children 3 years of age and over, dental services furnished by direct referral to a dentist for diagnosis and treatment.

continued

We agree with the plaintiffs that Indiana did not define the contents of its screening package with enough specificity to ensure that needy children in Indiana receive the thorough health screening intended by Congress. In so holding, we do not require that Indiana comply to the letter with every HEW guideline. We are of the view, however, that those guidelines well express the spirit of the statute in terms of the breadth of the screen intended. The special emphasis placed by Congress on a large scale preventive screening and treatment program indicates that Congress believed this health program would produce meaningful results. Without a thorough screening, including for example appropriate laboratory tests and a nutritional assessment, two diseases known to be among the leading health problems of poor children—malnutrition and lead poisoning—may well go undetected or unprevented.

General physical examinations may of course include all of the necessary features. Indiana, however, by requiring only a general physical examination (even with tests for vision, hearing, and dental or mental problems) leaves it to the provider to decide what services to perform.[5] Thus Indiana cannot "assure that screening...will be available to all eligible individuals under 21 years of age," 45 C.F.R. § 249.10(a)(3)(iv) (1975), or that the services are "sufficient in amount, duration and scope to reasonably achieve their purpose." 45 C.F.R. § 249.10(a)(5)(i) (1975).[6]

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42 C.F.R. § 441.56(a) (1980). At oral argument defendants' counsel stated that Indiana now defines a screening package that "word-for-word" tracks the language of the above provision. We have been unable to find that information in the record, but if that change has occurred, Indiana is in compliance insofar as defining for its providers the contents of a screening package.

[5] The guidelines require that a "screening package" be defined by the state to insure compliance by Medicaid providers with regulations. MSA-PRG-35, § 5-70.9-00 (1975).

[6] For purposes of reviewing the district court's 1976 decision, we have applied the regulations and guidelines in effect at that time.

B. Medical Providers

Indiana has not discerned which Medical providers are willing and able to provide screens. Instead it is assumed that all medical providers can and will provide the necessary service. Defendant Wayne Stanton, Administrator of the Indiana Department of Public Welfare, conceded that no Medicaid providers have explicitly agreed to do EPSDT screening. Although the defendants contend that caseworkers sometimes aid recipients in choosing an appropriate provider, the record shows that recipients may simply be handed a general list of Medicaid providers who have never themselves been assessed for the ability or willingness to perform complete screens.

Pursuant to 45 C.F.R. § 205.146(c)(ii) (1975), a state must

> [p]rovide or arrange for the provision of such screening services in all cases where they are requested. This means that a State must:
>
> (A) Inform recipients requesting screening services of the names and locations of providers *offering such services*....

(emphasis added) For that reason, 45 C.F.R. § 249.10(a)(3)(i) requires the "establishment of administrative mechanisms *to identify* available screening and diagnostic resources..." (emphasis added)[7] The defendants have not complied with those requirements.

C. Monitoring for Screening, Diagnosis, and Treatment

Indiana has no way of knowing whether a child has

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[7] HEW apparently intends that physicians will be given a choice as to whether to participate in the EPSDT program:

> [P]hysicians who participate in the Title XIX program should be informed by the State agency about the program and the components of the screening package. *If* a physician chooses to provide screening services....

MSA-PRG-27, § 5.70.9-00 (emphasis added).

received a complete screen. The record indicates that statistics are collected only on the basis of responses given on the "Medicaid Request for Payment" form submitted by Medicaid providers. Though question 33 on that form asks, "Was an examination performed for the EPSDT program?", it does not ask whether a complete screen was performed. An affirmative response is counted as a screen. Question 35 asks, "As a result of the screening, was further diagnosis and/or treatment required?" and an affirmative answer is also counted as a screen. Even if the answer is negative to both those questions, a "screen" is counted if the Medicaid provider bills for performing a physical, mental, eye or ear examination.

Besides not knowing whether complete screens are being performed, the defendants are not in compliance with the statutory mandate to provide "such health care, treatment and other measures to correct or ameliorate defects and chronic conditions discovered [from the screening], as may be provided in regulations of the Secretary." 42 U.S.C. § 1396d(a)(4)(B). Pursuant to 45 C.F.R. § 205.146(c)(iii) (1975), a state must

> [a]rrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is indicated by such screening services....[8]

Regulation 249.10(a)(3)(iv) (1975) mandates that "treat-

---

[8] A penalty is assessed for failure to

(1) inform all families in the State...of the availability of child health screening services....

(2) provide or arrange for the provision of such screening services in all cases where they are requested, or

(3) arrange for...corrective treatment the need for which is disclosed by such child health screening services.

42 U.S.C. § 603(g). We note that the requirement that corrective treatment be arranged, unlike the requirement for screening services, does not depend on a request from the recipient.

ment of conditions discovered...*will* be available to all eligible individuals...." (emphasis added).

This court has already recognized the mandatory obligation upon each state to pursue problems detected through screening with the necessary treatment. 504 F.2d at 1250. A failure to implement the treatment aspect of EPSDT unquestionably results in a failure of the entire program. Detection alone is meaningless without the appropriate follow-up.

For that reason "[p]rompt transmittal of the results of the screening procedures is necessary so that diagnostic studies and treatment can be instituted without delay." MSA-PRG-21, 5-70-20(B)(8). By regulation, a state must

> [t]ake steps to assist recipients needing diagnostic and treatment services so that such recipients are able to receive them within a reasonable time period. Initial diagnosis and treatment must be available normally within 60 days of the screening.

45 C.F.R. § 205.146(c)(1)(iii)(B). To avoid a penalty, the state must be able to document compliance with these conditions and "shall provide reports thereon as prescribed in this regulation and in Program Regulation Guides and Program Instructions issued by [HEW]." 45 C.F.R. § 205.146(c)(3). A regulation guideline on the subject of providing or arranging for corrective treatment states:

> The report must describe the arrangements made to assist eligible individuals in obtaining treatment, with supporting documentation in the form of State regulations, staff instructions, provider manuals, or written provider agreements, and describe procedures for identification of individuals needing treatment services under EPSDT who did not receive such services, for purposes of (i) assisting them in receiving such service within a reasonable time normally not to exceed 60 days and (ii) demonstrating that State action or inaction is not the cause of such failure to receive services within 60 days of screening date.

MSA-PRG-32, § 5-70-30A(1)(c).

We have been able to discern no evidence of a form or other means of required or consistent feedback from the Medicaid provider who performs the screen back to caseworker handling that recipient's file. In her deposition, Sherry Tollefson, Indiana Department of Public Welfare Supervisor of Program Administration, conceded that there was no such system. Moreover, as noted earlier, data collected on who was screened comes from the "Medicaid Request for Payment" form which can be returned up to twelve months after the screen is performed—hardly sufficient to assure that needed treatment is actually received within sixty days. It appears that the defendants rely on the providers to perform the treatment or refer the patients, or on the recipient to request help from the caseworker. In our view, the statute requires more. The state must assure that arrangements are made for treating detected health problems.[9] Without feedback from the Medicaid provider who performs the screen, the caseworker cannot know who needs treatment and who is getting it. Monitoring of this aspect of the program is mandatory in order to prevent future health problems as Congress intended.

In short, we conclude that Indiana has still not complied with this court's mandate that "EPSDT programs must be brought to the recipients." 504 F.2d at 1251. As we read 42 U.S.C. § 1396d(a)(4)(B) and its regulations and guidelines, Indiana cannot assure that it provides a screen sufficiently comprehensive for the purpose intended or that it pursues those health problems detected with the necessary treatment. In our view, the defendants have relied too heavily on their previous Medicaid program and have failed to comply with federal law.

We therefore reverse the judgment of the district court

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[9] *See supra* at 5, n.4.

regulations have been issued. Because nearly five years have elapsed between the 1976 judgment and the issuance of this opinion, and in interest of both justice and judicial economy, the district judge on remand should assess Indiana's resubmitted plan according to currently applicable federal law.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court

for the

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

LOUISE BOND, et al., *Plaintiffs,*	)	
vs.	)	CAUSE NO. 73-H-184
WAYNE A. STANTON, et al., *Defendants.*	)	

MEMORANDUM AND ORDER

This class action was brought seeking injunctive relief requiring the State of Indiana to implement the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program required by 42 U.S.C. § 1396 and 45 C.F.R. § 249.10(a)(3) and (b)(4)(ii). The requested injunctive relief was granted (See *Bond v. Stanton*, 372 F. Supp. 872 (N.D. Ind. 1974)). Then, on August 6, 1976, this Court determined that the State of Indiana's EPSDT Program had been brought into full compliance with the applicable statutes and regulations, and dismissed this action. That brief order of August 6, 1976, reads as follows:

> On July 16, 1976, this Court was presented with the Defendants' MEMORANDUM SHOWING FULL COMPLIANCE WITH ORDER OF MARCH 22, 1974. Upon examination of this memorandum and its various exhibits, and noting that the State of Indiana's EDSPT (sic) Program is in full compliance with the Department of Health, Education and Welfare's audit, this Court is compelled to DISMISS the above named suit against the Defendants.

On August 16, 1976, the Plaintiffs filed a motion to amend that order of dismissal.

This Court held an evidentiary hearing at which the Plaintiffs presented some documentary evidence. Defendant Wayne A. Stanton was extensively examined and cross-examined. The Court heard and saw Mr. Stanton and gives high credit to his testimony.

Given the evidence brought out at the hearing, this Court remains convinced that the dismissal was correct. It must be remembered that the key issue in this case was not whether the Department of Health, Education and Welfare believed Indiana to be in compliance with the applicable statutes and regulations, but whether Indiana was in compliance with the applicable statutes and regulations. As of August 6, 1976, Indiana was in compliance with the applicable statutes and regulations.

This Court's dismissal order of August 6, 1976, will not be disturbed. The Plaintiffs' motion to amend is DENIED.

ENTERED: 5/16/80

/s/ JUDGE, UNITED STATES
DISTICT COURT

cc: S. Moskowitz
I. Bodensteiner
J. Segovia
Ind Atty Gen
order book

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

LOUISE BOND, et al.	)
v.	)
WAYNE A. STATON, et al.	)

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/s/ Allen Sharp
Judge

Dated 8/6/76

Rule 52.

FINDINGS BY THE COURT

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. the motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court

without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 59

NEW TRIALS; AMENDMENT OF JUDGMENTS

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

42 U.S.C. § 1396d(a)(4)(B)

(B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary;

45 C.F.R. 205.146(c) (1976)

(c) *Penalty for failure to provide early and periodic screening, diagnosis and treatment of children under Title XIX of the Act*—(1) *General.* Pursuant to section 403(g) of the Act, notwithstanding any other provision of this chapter, total payments to a State under title IV-A of the Act for any quarter of any fiscal year beginning on or after July 1, 1974, shall be reduced by a percentage point (calculated without regard to any other reduction under this section), if the State fails to:

(i) Inform all families in the State receiving Aid to Families with Dependent Children under the State's title IV-A plan of the availability of child health screening services under the State's title XIX plan. For purposes of this provision to "inform" means to notify all AFDC families in writing no less often than annually of the

availability of the early and periodic screening, diagnosis and treatment (EPSDT) program under the State title XIX plan by providing pamphlets, brochures, or other written materials, which clearly and specifically describe (A) what EPSDT services are available ad (B) where and how they may be obtained. States must also have arrangements to inform those individuals for whom printed material is inappropriate.

(ii) Provide or arrange for the provision of such screening services in all cases where they are requested. This means that a State must:

(A) Inform recipients requesting screening services of the names and locations of providers offering such services, and of the transportation services available under the State plan as required under § 249.10(a)(5) of this chapter; and

(B) Take steps to assist recipients requesting screening services so that such recipients are able to receive them within a reasonable period normally not to exceed 60 days from the date of request.

(iii) Arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is indicated by such screening services and which is available under the State plan in accordance with § 249.10(a)93) of this chapter. This means that the State must:

(A) Inform recipients in need of diagnostic and treatment services of the names and locations of health providers offering such services, and of the transportation services available under the State plan as required under § 249.10(a)(5) of this chapter; and

(B) Take steps to assit recipients needing diagnostic and treatment services so that such recipients are able to receive them within a reasonable time period. Initial diagnosis and treatment must be available normally within 60 days of the screening.

(2) *Application of penalty.* (i) The penalty will be applied on a quarterly basis, beginning with the quarter starting July 1, 1974.

(ii) Determination of whether the penalty is applicable will be based on:

(A) Reports from States on actual compliance in practice with the conditions specified in paragraph (c)(1) of this section; and

(B) Such other surveys or reviews as may be deemed necessary SRS.

(3) *Documentation.* States must be able to document that they have met each condition of paragraph (c)(1) of this section and shall provide reports thereon as prescribed in this regulation and in Program Regulation Guides and Program Instructions issued by SRS.

45 C.F.R. 249.10(a)(3)(1976)

(a)(3) In carrying out the requirements in paragraph (a) (1) and (2) of this paragraph with respect to the item of care set forth in paragraph (b)(4)(ii) of this section, provide:

(i) for establishment of administrative mechanisms to identify available screening and diagnostic facilities, to assure that individuals under 21 years of age who are eligible for medical assistance may receive the services of such facilities, and to make available such services as may be included under the State plan;

(iv) That early and periodic screening and diagnosis to ascertain physical and mental defects, and treatment of conditions discovered within the limits of the State plan on the amount, duration, and scope of care and services, will be available to all eligible individuals under 21 years of age; and that, in addition, eyeglasses, hearing aids, and other kinds of treatment for visual and hearing defects, and at least such dental care as is necessary for relief of pain and infection and for restoration of teeth and maintenance of

dental health, will be available, whether or not otherwise included under the State plan, subject, however, to such utilization controls as may be imposed by the State agency. See § 205.146(c) of this chapter relating to reduction in Federal financial participation under title IV-A of the Act for failure to provide early and periodic screening, diagnosis, and treatment of children.

Opposition

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NO. 81-618

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT SMITH,

Individually and in his capacity as Acting Administrator of the Indiana Department of Public Welfare, et al.,

Petitioners,

vs.

LOUISE BOND,

Individually and on behalf of her minor children, and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

A. Statement of the Case

After the issuance of an injunction, 372 F.Supp. 872 (N.D. Ind. 1974), affirmance of the order granting an injunction by the Seventh Circuit Court of Appeals, 504 F.2d 1246 (7th Cir. 1974), and the denial of the defendants' petition for certiorari, 420 U.S. 984 (1975), on August 6, 1976, the district court entered an order finding the EPSDT component of Indiana's Medicaid program in full compliance with federal requirements and dismissed the case. (See Appendix attached to Petition, 15-A.) A timely appeal of this order was taken to the Seventh Circuit Court of Appeals, after the plaintiffs' Rule 59(e), F.R.C.P., Motion to Amend was denied by order dated May 16, 1980. (See Appendix attached to Petition, 13-14-A.) In its most recent opinion issued on July 27, 1981, the court of appeals reversed the district court order of August 6, 1976.

> We therefore reverse the judgment of the district court and remand for proceedings consistent with this opinion. (footnote omitted.) In deciding this case, we have relied on the regulations and guidelines in effect at the time the district judge entered his order in August 1976. Since that time, more detailed regulations have been issued. Because nearly five years have elapsed between the 1976 judgment and the issuance of this opinion, and in the interest of both justice and judicial economy, the district judge on remand should assess Indiana's resubmitted plan according to currently applicable federal law. (emphasis added)

655 F.2d 766, 772 (7th Cir. 1981).

B. Argument

1. The Court of Appeals Properly Reviewed the District Court Order of Dismissal.

In the first section of the argument the defendants mistakenly represent that the court of appeals reversed "the district judge's

denial of the motion to amend" (Petition at 4) and then argue that such a ruling can be reversed only upon a showing of abuse of discretion. Clearly the order before the court of appeals was the order of dismissal entered on August 6, 1976, not the May, 1980 order denying the Motion to Amend. The timely Motion to Amend filed by the plaintiffs pursuant to Rule 59(e), F.R.C.P., tolled the time for filing a notice of appeal of the earlier order. See Fed. R. App. P. 4(a). The fact that it took the district court nearly four years to rule on the motion, does not change the fact that it was the earlier order which was timely appealed.[1]

Once this is clarified, the argument at pages 4-6 of the Petition becomes totally irrelevant. None of the cases cited deal with the situation presented in this case. For example, the decision of this Court in Foman v. Davis, 371 U.S. 178 (1962), concerned a refusal to grant a plaintiff relief to amend a complaint and this was found to be an abuse of discretion. Id. at 182. All other cases cited in this section by the defendants are similarly irrelevant.

2. The Court of Appeals Did Not Give Retroactive Effect To Agency Regulations.

Defendants suggest that the court of appeals, despite the clear language of the opinion, applied the requirements of 1980 federal regulations to the state plan in effect in August of 1976. This claim is patently frivolous. The court of appeals could not have been more clear on this point in its opinion:

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[1]The defendants' last assertion that the plaintiffs did not exercise due diligence in prosecuting the Motion to Amend the judgment is not supported by the record. The plaintiffs never requested an extension of time. It was not the district court's practice to require a hearing on every motion. The plaintiffs filed a motion for a hearing on the Motion to Amend on August 11, 1978. Other efforts such as telephone calls to the district court's law clerks to obtain a ruling would not be reflected in the record, nor would the extent of the district court's backlog of cases.

> In deciding this case, we have relied on the regulations and guidelines in effect at the time the district judge entered his order in August 1976.

655 F.2d at 772. In the Motion to Amend filed in August of 1976, the plaintiffs asked the district court to do exactly what was done by the court of appeals, i.e., reverse the August 6, 1976 order finding full compliance on the basis of federal requirements in effect at that time. Because the motion was not decided before the change in federal regulations, in subsequent documents supporting their motion, the plaintiffs asked that the defendants be directed to submit a new plan in compliance with the revised regulations. It was entirely proper for the court of appeals to require on remand the submission of a new plan to be assessed under currently applicable federal law. Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974). After it has been determined that the state plan in effect in August 1976 was out of compliance with federal law, it would simply not make sense to require submission of a plan in 1981 which satisfies only 1976 requirements. Such a plan would be in violation of federal law before its effective date.

The court of appeals acted entirely within its scope of review in reversing the dismissal order of August 1976 and determining that the Indiana program then in effect did not comply with federal requirements. This is a determination of law, not a factual finding as the defendants contend. The court of appeals found that the district court was clearly erroneous in finding that Indiana's EPSDT program was in compliance in 1976. 655 F.2d at 769. As noted by the court of appeals, the district court did not make findings of fact, thus making it impossible to determine the basis of its conclusion. 655 F.2d at 772 n.10. The district court was given ample opportunity to make findings since this was one of the issues raised in the August 16, 1976 Motion to Amend filed by the plaintiffs. See, Rule 52(b), F.R.C.P.

C. Conclusion

Once the petitioners' distortion of the proceedings below is eliminated, it becomes quite apparent that the ruling of the Seventh Circuit in this case was absolutely correct. Certainly there has been no showing that this case falls within any of the "special and important reasons" for granting review on certiorari as set out in Rule 17 of the rules of this Court. Therefore, the petition must be denied.

Ivan E. Bodensteiner

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Individually and on behalf of her minor children, and others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, by counsel move the court for an Order pursuant to 28 U.S.C. §1915 and Rule 46 of the Rules of the Supreme Court of the United States allowing them to proceed in this cause in forma pauperis and submit all papers in typewritten form. In support of this motion respondents have attached an affidavit to the motion and state the following:

1. Respondents have proceeded in forma pauperis in all courts below and in this Court previously. Bond v. Stanton, 372 F.Supp. 872 (N.D. Ind.), aff'd, 504 F.2d 1246 (7th Cir. 1974), cert. denied 420 U.S. 984 (1975). Bond v. Stanton, 655 F.2d 766 (7th Cir. 1981).

2. The respondents represent the class of persons under age twenty-one (21) who are eligible for medical benefits under Title

XIX of the Social Security Act and challenged the Indiana state officials failure to implement a mandatory federal health program for needy children.

WHEREFORE, respondents pray their Motion to Proceed In Forma Pauperis be granted.

Ivan E. Bodensteiner

Michael Martin Mulder

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Valparaiso, Indiana 46383
(219) 464-5191

NO. 81-618

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROBERT SMITH,	)
	)
Individually and in his capacity as Acting Administrator of the Indiana Department of Public Welfare, et al.,	)
	)
Petitioner,	)
	)
vs.	)
	)
LOUISE BOND,	)
	)
Individually and on behalf of her minor children, and others similarly situated,	)
	)
Respondents.	)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

ON APPEAL IN FORMA PAUPERIS

I, Louise Bond being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress that I received in the United States Court of Appeals.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Approximately $2.00 an hour as a cook in 1976.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. I receive A.F.D.C. benefits for my son Dewayne Williams, who is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Louise Bond

Louise Bond

SUBSCRIBED AND SWORN to before me this 20th day of October, 1981.

Notary Public
County of Residence: LAKE

My Commission Expires:
6/5/88